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71-1606

Supreme Court, U. S.
FILED
JUN 9 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

IRVING P. KARLIN,

Petitioner,

v.

WARREN E. AVIS and AVIS INDUSTRIAL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1972

----------X

IRVING P. KARLIN

Petitioner

-against-

WARREN E. AVIS and AVIS INDUSTRIAL CORPORATION

----------X

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

----------X

The petitioner, Irving P. Karlin, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit, rendered in these proceedings on March 10, 1972.

Opinions Below

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, infra pp---31. The opinion of the United States District Court for the Eastern District granting defendants' motion for summary judgment is reported in 332 F. Supp. 957 (1971)

and appears at appendix B infra pp 42
The opinion of the United States District Court for the Eastern District denying the motion to dismiss this removed diversity action upon the grounds that there is no in personam jurisdiction over defendants and is reported in 326 F. Supp. 1325 (1971) and appears at appendix C infra pp 54.

Jurisdiction

The order or judgment of the United States Court of Appeals for the Second Circuit was entered on March 10, 1972. See Appendix A pp. 31 infra. A Timely petition for rehearing was denied on April 19,1972. See appendix D pp. 70 infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. 1254.

This action was removed from the New York Supreme Court to the Federal Court, Eastern District, New York, pursuant to 28 U.S.C. 1441 (a).

Questions Presented

Did the Circuit Court of Appeals for the Second Circuit render a decision in

conflict with the decision of the Court of Appeals of the State of New York in the same subject matter?

Has the Circuit Court of Appeals decided an important state question in a way in conflict with applicable state law?

Did the Court of Appeals for the Second Circuit decide an important question of federal law under Rule 56 of Civil Procedure in a way, which is in conflict with applicable decisions of this Court and inconsistent with the Due Process Clause of the Fourteenth Amendment.

The STATUTES and CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the New York General Obligation Law 5-701 (10) which says:

"Every agreement, promise or undertaking is void unless it or some note or memorandum thereof be in writing, and subscribed by the party, to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:"

(10) Is a contract to pay compensation for the services rendered in negotiating a loan, or in negotiating the purchase,

sale, exchange renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or stock interest in a corporation and including the creating of a partnership interest. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation, but shall not apply to a contract to pay compensation to an auctioneer, an attorney-at-law, or a duly licensed real estate broker or real estate salesman".

Rule 56 of the Federal Rules of Civil Procedure:

Summary Judgment (c)

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party

is entitled to a judgment as a matter of law.

Constitution of the United States Amendment 14, Section 1

"Nor shall any state deprive any person of life, liberty, or property, without due process of law".

STATEMENT OF FACTS

Some of the facts, relevant to the question presented in this petition are uncontroverted. All the relevant facts for the purpose of this petition may be introduced to the Court in a summary fashion.

Petitioner as a finder (as distinguished from a broker) arranged with one McNiece, Vice President and authorized agent for Avis Industrial Corporation and W.E. Avis personally, to sell the stock owned by Mr. Avis of the Avis Corporation, and the company itself. Petitioner was to obtain an offer of $4,000,000.00 for the Avis stock owned by Mr. Avis, and arrange to finance the corporation with $2,000,000.00 pending the transfer of control of the company.

To aid petitioner in promoting a deal, the following letter was addressed to petitioner by defendants.

Avis Industrial Corporation
29800 Stephenson Highway
Madison Heights (Detroit)
Michigan 48071 Te 313-547-9940

Sept. 1, 1968

Air Mail Special Delivery

Mr. Irving P. Karlin,
444 Middle Neck Road,
Great Neck, N.Y. 11023

Dear Irving:

Enclosed are the following:

1. Annual Report 1967
2. My report to W.E. Avis.
3. A letter dated June 1968 from Tom Ault our President to the employees of Avis.

I have written in some notes on my report which represents some 20-20 vision based on hindsight.

If you have any question please let me hear from you.

Sincerely yours,

S.E. McNiece
Enclosure

S.E. McNiece-Viee Pres.

Judge Bartels in his decision on the summary judgment motion to dismiss the removed diversity action, found the following facts as having taken place subsequent to the above letter of September 1, 1968.

> "In about September, 1968, Karlin spoke to Sidney McNiece, Treasurer, Secretary and Financial Vice President of Avis Industrial, with respect to a possible sale of Avis Industrial. McNiece suggested that the best way to effectuate the sale of the corporation would be a sale of the controlling stock interest, which was held by Warren Avis.------- After speaking with some prospective buyers, Karlin met with McNiece and Thomas J. Ault, the president of Avis Industrial, on or about October 15, 1968.--- At this meeting Karlin was told by McNiece and Ault that the company needed cash, that Warren Avis would not put it up but that Warren Avis "offered through Mr. Ault and Mr. McNiece (as officers of Avis Industrial Corp. and as authorized agents for Mr. Avis) to sell the corporation by a purchase of a controlling interest of Avis stock". Specifically, Karlin was told at the meeting that Warren Avis had authorized McNiece to explore with Karlin, as finder, a

a prospect for the purchase of the Warren Avis stock. Karlin told McNiece that he was looking for a commission of 5% of the consideration involved in the deal,half of it to be paid by each side. McNiece and Ault asked Karlin to consider reducing their side's fee to a lower recognized formula, which Karlin agreed to accept and for which McNiece assured Karlin that he had the approval of Warren Avis. A meeting was then arranged, attended by McNiece, Ault, Karlin, and one Richard Weisinger, a prospect found by Karlin who represented a buying group. At that meeting it became clear that Avis Industrial would, in fact, need more cash. Consequently, a possible $2,000,000 equity financing was discussed. In addition to other meetings, a final meeting was held in New York City on January 9,1969, attended by McNiece, Ault, Weisinger, and Warren Avis.At that meeting, not attended by Karlin, it was agreed that Warren Avis would sell all his Avis Industrial stock to Ultra Dynamics for $4,000,000 and that Avis Industrial would sell 49,744 shares of its treasury stock to Ultra Dynamics for $596,928. At the meeting Buyer and Seller agreed to set aside for Karlin a finder's fee of $132,000. The agreement was reduced to a formal writing in Detroit, Michigan, on or about January 16,1969. The formal agreement

recognized that Karlin was the finder entitled to be paid. Karlin was not paid.

Based upon this version of the facts, Karlin claims that he is entitled to a commission from Warren Avis on the sale of his personal stock and a commission from Avis Industrial on the sale of its treasury stock. His position is that the officers of Avis Industrial in negotiations with him acted for both Warren Avis and Avis Industrial. He claims that the ultimate goal was the sale of the corporation and that the only way to sell the corporation was to sell the controlling shares of its stock, which happened to be owned by Warren Avis. In addition, Karlin claims to have worked out a proposal for assisting the corporation to obtain working capital of $2,000,000 which proposal was not acted upon but which was partially substituted, for by the sale of the treasury stock."

(Karlin vs. Avis 326 F. Supp. 1325 at page 1327)

In finding jurisdiction Judge Bartels said:

"Since no affidavit submitted by the defendants disputes the crucial facts that a brokerage agree-

ment was concluded in New York between Karlin and McNiece and Ault, acting as agents for Warren Avis, the case falls squarely within § 302 (a) (1). The argument of Warren Avis that the final contract between Avis and Ultra Dynamics for the sale of Avis stock was consummated in Michigan, not New York, is entirely irrelevant since it is the finder contract, not the Ultra Dynamics contract, which gives rise to the instant cause of action". (at page 1328).

Judge Bartels finding that an agreement to pay petitioner a finder's fee can be supported by the fact that on October 16,1968 (the day following the meeting held on October 15) and on November 16,1968 a month later letters were written to defendants confirming their willingness to sell and pay petitioner one half of the finder's fee.

The contracts between Avis and Ultra and Avis Industrial and Ultra were the usual detailed and legally effective buy and sell agreement contained the following 2 additional clauses pertinent to this case.

> "You (Avis), have not dealt with any broker or finder in connection with the sale of the shares, other than Mr. Irving Karlin". (Petitioner here).

"We (Ultra) acknowledge that no broker or finder has been involved in our negotiations except Mr. Irving P. Karlin. We agree that we shall pay in full the finder's fee payable to Mr. Karlin upon final consummation of this transaction".

A summary of the necessary facts to aid this Court to determine whether judicial discretion should be exercised in certiorari to petitioner follows:

A writing exists between buyer and seller subscribed by Avis, the party to be charged wherein (1) the parties (Avis and Ultra) are identified (2) the matter of the contract is described (sale and purchase of stock, price, and terms) (3) an admission by buyer and seller that petitioner alone was the finder who performed the services in the sale of the Avis stock (4) that an obligation to petitioner exists.

The writing does not provide for the rate of compensation, but as between Avis and Ultra, the latter agrees to pay the full finder's fee. Petitioner was not a party to the writing and was not informed of its contents.

No appeal was taken from Judge Bartels'determination of May 20, 1971. He determined there that defendants agreed to pay a finder's fee.

In the subsequent motion for judgment he was of the opinion that a writing must contain the promise to pay. Since the writing between Avis and Ultra shifted the burden to pay the finder's fee from Avis to Ultra the writing did not affirmatively promise to pay. Even though petitioner was not a party to that agreement the inference is that Judge Bartels felt that if you use an agreement to satisfy the Statute of Frauds you are bound by whatever else is found in the agreement. He concluded that a shifting of the obligation is a negation of liability and not an affirmative promise to pay.

If we are correct that there need be no affirmative written promise to pay, the fallacy of his conclusion is apparent.

The Circuit Court of Appeals went a step further and said it believed the present version of defendants that they never promised to pay. To reach this unnecessary conclusion the Appellate Court discussed matters entirely irrelevant to the issue.

Reasons for Granting the Writ:

This Court said in RUHLIN et al vs. New York Life Insurance Co., 304 U.S. 202-206.

"The Rules indicate that the Court will be persuaded to grant certiorari where a Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decision".

The decisions below directly conflicts with the decision of the highest court of the State of New York. Cohon & Co. vs. Russell, 23 N.Y. (2)560 in the same subject matter.

The final sentence of the Circuit Court of Appeals opinion reads: "Because appellant has failed to demonstrate compliance with the Statute of Frauds, we affirm".

They based their affirmance by the following statement in their opinion:

"Finder's fees generally are allowed only upon a showing of affirmative written evidence of assent to paying the fee by the person to be charged".

Concededly petitioner has no separate

writing from Avis or Avis Industrial Corp. wherein they specifically agree to pay. If the Cohon case mandates that such a writing is required, the decision below is proper.

However the Cohon case specifically says no such writing is required and petitioner meets all the other requirements of Cohon & Co. vs. Russell supra that are needed to satisfy the Statute of Frauds.

A summary of the Cohon case is found in the head note as follows:

> "Sections 5-701 of the General Obligations Law provides that an agreement to pay compensation for services rendered in negotiating the sale of an interest in a corporation is void unless a memorandum thereof be in writing subscribed by the party to be charged. Plaintiff relies on a contract of sale, made one year after plaintiff's agreement, between the purchaser on one hand, and defendant and two others as owners of the stock on the other.
>
> A clause in such contract states that the sellers (including defendant) "represent and warrant that they have dealt with no person

or persons other than [plaintiff] as broker or finder in connection with the transactions in this agreement and that all negotiations relative to this agreement have been carried on by them without the intervention of any other broker or finder, and the Sellers agree to indemnify Buyer and the Company and hold them harmless against and in respect of any claim for brokerage or finder's commission relative to this agreement whether by said [plaintiff] or otherwise". Such memorandum, by reasonable construction and necessary implication, is sufficient to satisfy the Statute of Frauds. The writing identifies the parties to the contract, the subject matter of the contract and contains an admission by defendant that plaintiff performed services in the sale of the stock and that an obligation to plaintiff exists. It is immaterial that the rate of compensation is not stated since if the memorandum evidences the fact of plaintiff's employment, the obligation of defendant to pay reasonable compensation is implied".

As in the Cohon case we have in our case a formal contract of purchase and sale which was signed by Warren E. AVis and Ultra Dynamics on 1/16/69 and which recognized petitioner as the producer.

The agreement which Avis signed with Ultra, is like in the Cohon case, subscribed Avis, it described the transaction (sale of specified stock at a given price) it recites no other broker brought about the sale other than petitioner. That petitioner was the sole finder in the transaction. Omitted in the Cohon case and in our case is a writing specifying the rate of compensation.

The only factual variation between our and the Cohon case is that in the Cohon case the Seller agreed to indemnify the buyer for any claims and in our case the buyer agrees with the seller that it will pay the entire finder's fee.

These differences have no relevancy in determining whether the Statute of Frauds applies. If however an agreement to pay is required which may be spelled out by inference, we have it.

In the Cohon case the agreement to in-

demnify the buyer is not the equivilent of an original promise by the seller to pay the fee. On the other hand the agreement between Avis and Ultra that Ultra will pay the whole fee is an admission that part of the entire fee was the obligation of Avis which he recognized he was obligated to pay. If Avis had no obligation to begin with why have Ultra agree with Avis, that Ultra is to pay the entire fee? Why not agree that Ultra holds Avis harmless for any claim?

What the N.Y. STate Court of Appeals held was that the memorandum is sufficient if it evidences the fact of petitioner's employment. It need not state any rate of compensation, as reasonable compensation is implied. Nowheres in the entire decision do we find a requirement that the memo must recite an undertaking to pay by either of the parties to satisfy the Statute of Frauds.

The Avis Ultra agreements recite that petitioner was employed to bring about a sale and he did bring about the deal.

In our petition for a rehearing we

submitted to the Appellate Court two Special Term Supreme Court cases (Laidlaw vs. Maple (L.J. Nov. 30/71 Korn J) and Klein vs. Smigel (LJ April 7, 1972 Amsterdam J. wherein the Cohon case was discussed and in each case the conclusion was reached that there need not be a writing to pay a finder's fee as long as the writings identify the person employed as the finder. Compensation follows as a matter of law on a quantum meruit basis.

We cannot reconcile the interpretation given to the N. Y. General Obligation Law 5-701 [10] by the Circuit Court of Appeals that there must be an express provision in writing to pay a finder's fee when the State Court of Appeals Court and other State decisions hold to the contrary.

In Huddeston vs. Dwyer 322 U.S. 232 pg. 236 this court said:

> "State law is the controlling rule of decision in this case as to both substantive and procedural rights of the parties. Erie R. Co. vs. Tompkins, 304 U.S. 64; Federal Rules of Civil Procedure, Rules 69 (a), 81 (b) 28 U.S.C. following § 723 (c).

> The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts, cf. Kuhlin vs. New York Life Ins. Co. supra. When we are called upon to decide them, the expression of the views of the judges of those courts, who are familiar with the intracacies and trends of local law and practice, if not indispensable, is at least a highly desirable and important aid to our determination of state law questions. This Court will not ordinarily decide them without that aid where they may conveniently first be decided by the court whose judgment we are called upon to review.

Summary Judgment

If the Circuit Court of Appeals had followed the Cohon case as decided by the Court of Appeals of New York, the action should not have been dismissed as in violation of the Statute of Frauds.

The question arises whether Rule 56 sanctioned summary judgment in this case. Both plaintiff and defendant moved for summary judgment principally to determine

whether the Statute of Frauds applied to the facts so as to obviate a long trial. The District Court practically limited his decision to a determination of this issue. The Circuit Court of Appeals went beyond the question of whether there is non compliance with the Statute of Frauds and resolved all factual disputes in favor of defendant.

Judge Bartels, no doubt had in mind that on the motion to dismiss for lack of jurisdiction he found an oral agreement existed between petitioner and defendants, but in the belief that such oral agreement to pay must be reflected even if only by inference in a writing signed by the defendant, he concluded this cannot result because Avis in the agreement with Ultra negated a promise to pay by shifting the obligation to Ultra.

Judge Bartels and the Appellate Court both held that the Cohon case require a promise to pay and it must be in writing.

RULE 56 of the FEDERAL CIVIL PROCEDURE LIMITS SUMMARY JUDGMENT ONLY WHEN THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THAT THE MOVING PARTY IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

In A.J. SIMLER VS. CONNER

83 S. Ct. 609, 372 U.S. 221, (1963)

This Court in a diversity action, as is ours, granted certiorari in a case involving lawyers' fees and reversed summary judgment on the ground that a trial by jury could not be obviated by an order granting summary judgment. Said this court:

"In diversity cases of course, the substantive dimension of the claim asserted finds its source in State Law Erie R. Co. vs. Tompkins 304 U.S. 64, 58 S. Ct. 817, Cities Service Oil Co. vs. Dunlap 308 U.S. 208, Palmer vs. Hoffman 318 U.S. 109".

In American Manufacturers Mutual Ins. Company against American Broadcasting Theatres Inc. 388 Fed.Rep.(2)272(CCA 2Cir) the same Appellate Court clearly sets forth when summary judgment lies but refused to do so in this case.

In reversing summary judgment where both parties claimed as here that there were no issues of fact the Court said:

> "The well settled rule is that cross motions for summary judgment do not warrant the court in granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed". (279).
>
> "The importance of summary judgment in the structure of modern federal practice as a procedural weapon to pierce sham claims and resolve actions where the facts are undisputed has been frequently noted by this court (278).

If summary judgment was in order it should have been granted in favor of this petitioner and not to defendants.

Petitioner's claim to compensation cannot be disturbed or avoided on any theory of law.

Petitioner was a finder and not a broker. The distinction between a broker and a finder lies in the fact that a broker must bring about a meeting of the minds of the parties. A completed agreement between buyer and seller is required and all the terms of the employment including compensation between the broker and principal must be contracted before compensation can be claimed and only after a closing.

A finder merely finds, interests, or introduces and arranges for a meeting of the parties who then alone negotiate and consummate a deal. Ames vs. Ideal, 27 Misc. Rep. (2) 883; 235 N.Y.S. (2) 622 (and cases collated therein).

And so a finder may receive full compensation by merely making two (2) phone calls Minichiello vs. Royal 18 N.Y. (2) 521, 527.

It is conceded that after a conversation between petitioner and Avis's agent, on September 17,1963 McNiece mailed certain

data pertaining to defendants to help petitioner obtain a prospect for the Avis stock. Petitioner with the aid of the material furnished by Avis, obtained an interested buyer to whom Avis made a complete sale of his stock. The interest was created by petitioner before the meeting which he arranged for October 15, 1968.

Although Judge Bartels in his accepted petitioner's version, that there was an oral agreement to pay him, the Appellate Division's contrary finding has no bearing on petitioner's right to reasonable compensation, as the work petitioner was engaged to do took place before the October 15 meeting. After the work was done by petitioner, Avis could not take a position that he would go through with the deal, but will not pay for the services of the petitioner.

At the time the meeting took place, petitioner had completely performed his job. The only option Avis had was not to further negotiate or complete the deal. He never advised petitioner in writing that he assumes no responsibility to pay. He failed to answer petitioner's letters wherein the understanding

of all the parties to pay him is recorded. Avis led petitioner to believe he would be paid and on that basis petitioner did perform additional services. The original asking price for the stock was the price eventually paid. The only question open was the reasonable value of petitioner's services. The defendants did not put this in issue.

The Circuit Court of Appeals discussed at great length a letter agreement between Ultra and petitioner to which agreement defendants were not a party. The purpose of it was to change Ultra's obligation to pay in stock instead of in cash. Performance was contemplated, as it may have been modified orally, and was never intended to release the defendants as is conjectured by the Appellate Division. The letter does not say so and was not so intended.

AS TO PETITIONER'S CLAIM AGAINST AVIS INDUSTRIAL CORP.

The facts in our case are governed by Bradkin vs. Leverton, 26 NY (2) 192.

It was there held:

"Although there was no agreement between them, express or implied, the defendant received a benefit from the plaintiff's services under circumstances which injustice, preclude him from denying an obligation to pay for them.

A quasi or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth it is not a contract or promise at all. It is an obligation which the law creates in the absence of the agreement.

Bradkin vs. Leverton supra holds that where a third party is concerned, the Statute of Frauds provides no defense to him and no contract in writing of any kind, is required. Petitioner is entitled to receive compensation on the value of the Treasury stock sold by Avis Industrial to Ultra Dynamics.

With the knowledge aforesaid, Avis Industrial Corp. substituted for a working capital arrangement a $596,928.00 treasury stock sale. Petitioner did not discover this for several months after Avis and Ultra signed the agreement.

There is no issue raised as to the fact that Ault, McNiece and Avis switched from a $2,000,000.00 financing project, developed by petitioner to a sale of treasury stock. Petitioner's contention is that as part of the sale of the Avis stock Ultra was produced by him as a prospect for financing. The officers of Avis Industrial with full knowledge of the facts could not freeze out petitioner's right to compensation by changing the deal.

The concluding sentence of the Court of Appeals opinion is:"Because appellant has failed to demonstrate compliance with the Statute of Frauds, We affirm.

The reason for so holding is the statement of the Court--"Finder's fees generally are allowed only upon a showing of the affirmative written evidence of assent to paying the fee by the person to be charged. See Minichiello,supra, 18 NY. 2d at 526-27".

The holding and the application of Minichiello is clearly defined in a later case by the same Court of Appeals of N.Y. in Cohon & Co. vs. Russell,23 N.Y. 2d 569 at page 572 as follows:

> "In Minichiello vs. Royal Business Funds Corp.(18 N.Y. 2d 521) a business broker who had no written memorandum of his alleged contract with

the defendants brought an action in quantum meruit. After reviewing the legislative history surrounding the enactment of section 5-701 (subd. 10) of the General Obligations Law and its predecessor, section 31(subd. 10) of the Personal Property Law, and the recommendations made by the Law Revision Commission with respect to each enactment, this court concluded that both statutes preclude any recovery in quantum meruit.

In the instant case, the plaintiff does rely upon a written memorandum and, therefore, Minichiello is inapplicable because that case is limited to situations in which there is a complete absence of any memorandum. Indeed, the statute itself provides that: "This provision shall apply to a contract implied in fact or in law to pay reasonable compensation"(General Obligations Law,§ 5-701). Thus, as the Appellate Division noted, if the memorandum is otherwise sufficient. "The obligation of the defendant to pay reasonable compensation for the specified services would then be implied without the necessity of resort to parol evidence." (20 A.D. 2d 221-224)."

In our case we have the same situati as in the Cohon case.

There is a serious doubt as to the validity, correctness or adequacy of the

precedent relied upon by the Court of Appeals of the Second Circuit since its opinion is in direct conflict with the latest decision of the Court of Appeals and other Court decisions holding that no affirmative written consent to pay is required. This case is of great precedent potential and of public concern. An action for a finder's fee instituted in the New York State Court, under the circumstances given, would result in favor of the finder and by transferring the case to the Federal Court would negate any recovery. This makes for an inequitable situation.

In our case petitioner finds himself in the category of a poor person. Two years of hard work resulted in no return. Millions accrued to the defendants. Surely the law was never intended to permit a party to say because of a possible legal loophole I am not going to pay you for your labor.

Petitioner should not be deprived of his property without due process of law.

CONCLUSION

For the reasons given, a writ of Certiorari should issue to review the order, judgment and opinion of the Court of Appeals for the Second Circuit and upon review reverse and direct judgment, for petitioner.

Respectfully Submitted,

JOSEPH HELLER
Counsel for Petitioner
51 Chambers Street
New York, N.Y. 10007

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 489—September Term, 1971.

(Argued February 1, 1972 Decided March 10, 1972.)

Docket No. 71-2084

IRVING P. KARLIN,

Plaintiff-Appellant,

v.

WARREN E. AVIS and AVIS INDUSTRIAL CORPORATION,

Defendants-Appellees.

Before:

HAYS and OAKES, *Circuit Judges,*
and CLARIE, *District Judge.**

Appeal from an order and decision of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge*, granting defendants' motion for summary judgment in a diversity case involving plaintiff's claim to a finder's fee on the sale of Avis Industrial Corporation stock.

Affirmed.

JACOB E. HELLER, New York, New York (Joseph Heller, on the Brief), *for Plaintiff-Appellant.*

* Of the District of Connecticut, sitting by designation.

WILLIAM S. GREENAWALT (Royall, Koegel & Wells), New York, New York, *for Defendants-Appellees.*

OAKES, *Circuit Judge:*

Plaintiff-appellant Irving Karlin sought below to recover from each defendant a "finder's fee" for his role in the sale of Avis Industrial Corporation (Industrial) stock to Ultra Dynamics Corporation (Ultra).[1] Judge Bartels, in an unreported decision, granted defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56(b). We affirm.

The stock was held in part by Industrial as treasury stock and in part by Warren E. Avis (Avis),[2] owner of a controlling interest in Industrial. Appellant received from Ultra 9,000 shares of its common stock as his finder's fee, but he contends that at most this stock constituted only one-half of his fee, with Avis and Industrial obligated to furnish the remaining one-half.

Despite disagreement between the parties as to whether appellant or Industrial officials first broached the idea of selling stock in Industrial to Ultra, it is agreed that appellant brought together Industrial officials and Ultra officials. The question is whether defendant Industrial or defendant Avis ever agreed to pay a finder's fee to appellant. The lower court concluded that no writing existed sufficient to bind Avis or Industrial under the New York Statute of Frauds on finder's fees. N.Y. Gen. Oblig. Law §5-701(10) (McKinney 1964).

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1 Pursuant to 28 U.S.C. §1441(a) this action was removed from the New York Supreme Court.

2 The distinction between Avis individually and Avis Industrial must be kept clear in order to understand appellant's arguments regarding each.

The underlying facts are not in dispute. On October 15, 1968, appellant introduced officials of Industrial and Ultra. Prior to that meeting, Richard H. Weisinger, chairman of the board of Ultra, signed a letter in which he agreed that, if Ultra acquired control of Industrial by purchasing stock from Avis, appellant would receive a five per cent commission, half paid by Ultra as buyer and half by Avis personally, as seller of the stock. Avis was not a party to this arrangement. At the October 15 meeting Sidney McNiece, an officer of Industrial, told appellant that Avis as an individual would under no circumstances pay any part of a finder's fee. A letter of October 16, 1968, from appellant to Thomas Ault, president of Industrial, noted the agreement between Weisinger and appellant; Ault did not respond to that letter. One month later, on November 16, appellant sent a letter to McNiece of Industrial, in which he enclosed a letter of October 28 from Weisinger to Avis. The Weisinger letter to Avis proposed that Ultra and Avis split the finder's fee cost evenly between them, and contained a blank for Avis's signature of agreement. Avis did not sign, and McNiece told Weisinger over the telephone that Avis had rejected the idea.

Negotiations regarding purchase of the stock continued despite the disagreement over the finder's fee. On January 9, 1969, at a meeting between Ultra and Avis representatives, the possibility that Ultra might purchase treasury stock directly from Industrial (as opposed to purchasing from Avis individually) was discussed. Appellant, who was not present at the January 9 meeting, was told within a week about the new purchase possibility and about Avis's continuing refusal to pay any part of the finder's fee. During a meeting between Avis's and Ultra's representatives in Detroit on January 16, 1969, Avis and Ultra reached a tentative sales agreement of which appellant, who was present at the meeting place,

was advised. At the same time, after negotiating with Messrs. Reich and Weisinger of Ultra, appellant signed an agreement in which he agreed to accept 9,000 shares of Ultra common stock as ". . . full consideration . . ." for his work as finder "[i]n connection with the agreements between you [Ultra] and Warren E. Avis *and* you and Avis Industrial Corporation . . . ." [Emphasis supplied.][3]

Ultra then signed sales agreements with Avis personally and with Industrial. The agreement between Ultra and Avis mentioned the finder's fee in a way adverse to appellant's claim:

> 2(c). You [Avis] have not dealt with any broker or finder in connection with the sale of the shares, other than Mr. Irving P. Karlin.
>
> • • •
>
> 15. We [Ultra] acknowledge that no broker or finder has been involved in our negotiations except Mr. Irving P. Karlin. We agree that we shall pay in full the finder's fee payable to Mr. Karlin upon final consummation of this transaction.

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3 The full text of the January 16, 1969, agreement reads:

January 16, 1969

Ultra Dynamics Corporation
Two Wall Street
Paterson, New Jersey

Gentlemen:

In connection with the agreements between you and Warren E. Avis and you and Avis Industrial Corporation I have acted as finder. In full consideration thereof I agree to accept Nine Thousand (9,000) Shares of Common Stock, $.10 par value, of Ultra Dynamics Corporation and do hereby release you from any and all further claims thereunder. Such payment to me shall be paid upon final consummation of the foregoing transaction.

/s/ IRVING P. KARLIN
Irving P. Karlin

Agreed and Accepted.
/s/ ULTRA DYNAMICS CORPORATION

The agreement between Ultra and Industrial did not mention the finder's fee.

On November 10, 1969, plaintiff accepted the 9,000 shares of Ultra, the certificate for which marked the shares as restricted stock.[4] On July 19, 1971, some 2½ years after agreeing to accept the stock as full compensation, appellant for the first time claimed, in a letter to Weisinger of Ultra, that the restricted stock "was not in accordance with our agreement." That letter came when Ultra's stock had dropped to about $1 per share from its $12⅛ value at the time of transfer to appellant in 1969. This suit followed shortly after the July 19 letter.

We agree with Judge Bartels that the New York Statute of Frauds is applicable to this case. *Minichiello* v. *Royal Business Funds Corp.*, 18 N.Y.2d 521, 223 N.E.2d, 793, 277 N.Y.S.2d 268 (1966), *cert. denied*, 389 U.S. 820 (1967). Appellant argues here for the first time that the pertinent section of the statute[5] applies only to the sale of a majority

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4 The restriction, prohibiting sale in the absence of registration with the SEC, was the usual one relating to unregistered shares within the terms of section 5 of the Securities Act of 1933, 15 U.S.C. §77e.

5 The section of the statute governing finder's fees and related transactions reads:

> Every agreement, promise or undertaking is void unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> . . . .
>
> 10. Is a contract to pay compensation for services rendered in negotiating a loan, or in *negotiating the purchase, sale,* exchange, renting or leasing of any real estate of interest therein, or *of a business opportunity,* business, its good will, inventory, fixtures or an interest therein, *including a majority of the voting stock interest in a corporation* and including the creating of a partnership interest. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attor-

interest in a corporation's stock. *Minichiello* explicitly rebuts this argument by its conclusion that the phrase "including a majority of the voting stock interest" in the statute explains one aspect of, rather than restricts the meaning of, the statutory language concerning sales ". . . of a business opportunity . . . ." 18 N.Y.2d at 527-28, 223 N.E.2d at 796, 277 N.Y.S.2d at 272.

While *Morris Cohon & Co.* v. *Pennsylvania Coal & Coke Corp.*, 10 App. Div.2d 667, 668 (1st Dep't 1960), contains language to the contrary, it was effectively overruled by *Minichiello, supra*, and explicitly by *Clivner* v. *Ackerman*, 51 Misc.2d 856, 857, 274 N.Y.S.2d 112, 114 (Sup. Ct. 1966), *aff'd*. 30 App. Div.2d 642, 291 N.Y.S.2d 759 (1st Dep't 1968) (mem.). *Clivner* concluded that:

> [W]here . . . the transfer of the minority interest is coupled with other circumstances so as to clothe the purchaser with the right to dictate the business policies of the corporation, it exceeds the realm of simple investment and becomes a transfer of a business or business opportunity within the meaning of the statute.
>
> 51 Misc.2d at 857-58, 274 N.Y.S.2d at 114-15.

The sale of Avis's stock which comprised about 43 per cent of the stock of Industrial, meets the statutory requirement for a "business opportunity" as set forth in *Clivner, supra*. Other pre-*Minichiello* and *Clivner* cases cited by appellant[6] are inapposite in light of the later cases.

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ney at law, or a duly licensed real estate broker or real estate salesman.

N.Y. Gen. Oblig. Law §5-701(10) (McKinney 1964). [Emphasis supplied.]

6 *Braverman* v. *Metropolis Bowling Centers, Inc.*, 18 App. Div. 2d 1089, 239 N.Y.S.2d 581 (2d Dep't 1963); *Wells* v. *Dent*, 4 App. Div. 2d 307, 164 N.Y.S.2d 646 (4th Dep't 1957).

Further, because appellant seeks to recover from both Avis and Industrial, the two blocks of stock that were sold to Ultra could be combined for purposes of determining applicability of the statute, in which case a majority of the voting stock interest would be involved.

The Statute of Frauds requires a memorandum in writing ". . . subscribed by the party to be charged . . . ," and appellant has produced no such writing. To support his claim, appellant points to several documents and legal arguments, which will be considered separately and together.

The first documents concern the claim against Avis personally. The January 13, 1969, Avis-Ultra agreement, quoted in note 3 *supra*, obligates Ultra, not Avis, to pay the full finder's fee, and thus can in no way support appellant's claim against Avis. *Morris Cohon & Co.* v. *Russell*, 23 N.Y.2d 569, 245 N.E.2d 712, 297 N.Y.S.2d 947 (1969), does not aid appellant. The agreement there stated that the defendant seller would indemnify the buyer for any finder's fee; here, the *buyer* explicitly agreed to pay, and neither seller can be held. Appellant argues, as he did not below, that the January 16 agreement, which mentions the finder's fee, somehow removes the case from the Statute of Frauds. Because there is nothing in the January 16 agreement acknowledging Avis's intent to be bound by an oral agreement regarding division of payment of the fee with Ultra (in fact quite the opposite is the case), appellant is not assisted by cases holding that writings signed by the party to be charged which *acknowledge* the making of an oral contract may satisfy the Statute of Frauds. *See, e.g., Townsend* v. *Hargraves*, 118 Mass. 325, 334-35 (1875); *Argus Co.* v. *Mayor of Albany*, 55 N.Y. 495, 14 Am. R. 296 (1874). The market price for Ultra stock at the time it was accepted by Karlin in payment of his finder's fee was in excess of $108,000 although he would have been entitled to $140,000 had Avis agreed to

his proposal. It seems apparent that he negotiated this with Ultra in view of Avis's unwillingness to pay him anything, and in hopes that the price of Ultra stock would advance.

Appellant attempts to meet the memorandum requirement as to Avis by contending that all writings in the case, including the January 16 agreement, taken together are sufficient to bind the defendants. As did the district court, we find this unconvincing. The letters sent to Industrial officers that mentioned the splitting of the finder's fee between Ultra and Avis were unanswered by Avis.

Appellant is therefore reduced to the contention that Avis was under a duty to reply to these letters and that the failure to reply constitutes acquiescence in appellant's fee proposal. There are several answers to this claim. Finder's fees generally are allowed only upon a showing of affirmative written evidence of assent to paying the fee by the person to be charged. *See Minichiello, supra*, 18 N.Y.2d at 526-27, 223 N.E.2d at 796, 277 N.Y.S.2d at 272. No such affirmative action was taken by Avis. On the contrary, appellant was informed several times that his proposal was rejected by Avis, most pointedly by Avis's failure to sign the proposal sent to him by Weisinger on October 28, 1968. These rejections hardly constitute silence within appellant's theory of silence constituting acceptance. Further, assuming arguendo that Avis was under a duty to speak, he did speak, and his verbal responses to written proposals were proper. *Gray* v. *Kaufman Dairy & Ice Cream Co.*, 162 N.Y. 388, 397-98, 56 N.E. 903, 905-06 (1900); *Learned* v. *Tillotson*, 97 N.Y. 1, 12, 49 Am. R. 508 (1884). The cases relied upon by appellant[7] show only that silence

7 *Megarry Bros., Inc.* v. *United States*, 404 F.2d 479 (8th Cir. 1968); *Hellenic Lines, Ltd.* v. *Gulf Oil Corp.*, 340 F.2d 398 (2d Cir. 1965); *Willard Helburn, Inc.* v. *Spiewak*, 180 F.2d 480 (2d Cir. 1950).

may equal acquiescence in special circumstances, *e.g.*, when an oral contract already exists, which was not the case here. In New York silence as acceptance generally arises only when the effect of silence is to mislead the other party, *Tannenbaum Textile Co.* v. *Schlanger*, 287 N.Y. 400, 404, 40 N.E.2d 225, 227 (1942); *More* v. *New York Bowery Fire Insurance Co.*, 130 N.Y. 537, 545, 29 N.E. 757, 758-59 (1892), an effect neither alleged nor shown here. An offeror has no power to transform an offeree's silence into acceptance when the offeree does not intend to accept the offer, *Albrecht Chemical Co.* v. *Anderson Trading Corp.*, 298 N.Y. 437, 84 N.E.2d 625 (1949); Avis's intent was clearly not to accept appellant's fee proposal. The New York law on silence as acceptance is firmly supported by the Restatement of Contracts.[8]

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8 ACCEPTANCE BY SILENCE OR EXERCISE OF DOMINION.

(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases and in no others:

(a) Where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would indicate to a reasonable man that they were offered with the expectation of compensation.

(b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.

(c) Where because of previous dealings or otherwise, the offeree has given the offeror reason to understand that the silence or inaction is intended by the offeree as a manifestation of assent, and the offeror does so understand.

(2) Where the offeree exercises dominion over things which are offered to him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance. If circumstances indicate that the exercise of dominion is tortious the offeror may at his option treat it as an acceptance, though the offeree manifests an intention not to accept.

Restatement of Contracts §72 (1932). *See* 1 A. Corbin, Contracts §§72, 73 (1953); 1 S. Williston, Contracts §91 (3rd ed. W. Jaeger 1957).

None of the documents relied upon by appellant was prepared or signed by Avis. In New York unsigned writings prepared by a plaintiff, without more, do not suffice to bind a defendant. *Solin Lee Chu* v. *Ling Sun Chu*, 9 App. Div. 2d 888, 889, 193 N.Y.S.2d 859, 860 (1st Dep't 1959). *Crabtree* v. *Elizabeth Arden Sales Corp.*, 305 N.Y 48, 110 N.E.2d 551 (1953), cited by appellant, involved three documents, consistent with one another, prepared by the defendant in that case, only two of which were signed. Defendant was held to be bound by his own documents. Here, the unsigned letters prepared by plaintiff, not defendants, proposed a split in the fee while the signed Avis-Ultra agreement placed the burden of paying entirely on Ultra.

Appellant also points to certain alleged written "admissions" made by appellees in their answer and summary judgment affidavits. These "admissions," appellant contends, at least when combined with the other writings discussed above, constitute the writing necessary to bind Avis. But these "admissions" do nothing more than admit certain undisputed facts—*e.g.*, the role of McNiece as Avis's representative and the occurrence of negotiations between appellant and Avis; nowhere do they mention any agreement by Avis to pay a finder's fee.

Appellant also seeks to recover a fee from Industrial in the face of his agreement with Ultra, see note 3 *supra*, despite the absence of any correspondence between Industrial and himself on this subject, and despite the absence of any reference to a finder's fee in the Industrial-Ultra sales agreement of January 16, 1969. He relies on *Bradkin* v. *Leverton*, 26 N.Y.2d 192, 257 N.E.2d 643, 309 N.Y.S.2d 192 (1970), a case in which there was (1) a valid written contract obligating defendant to pay a finder's fee and (2) interference with that contract by an officer of defendant corporation to plaintiff's detriment. Here, neither of these

circumstances essential to the holding of *Bradkin, supra,* existed. Appellant's suggestion that he and McNiece of Industrial were involved in a financing scheme, interference with which is actionable under part (2) of *Bradkin, supra,* finds no support in the record. Further, the only written agreement, pursuant to part (1) of *Bradkin, supra,* stated that appellant accepted the Ultra stock as full payment for the sale of Avis's stock *and* of Industrial's treasury stock. Note 3 *supra.*

Because appellant has failed to demonstrate compliance with the Statute of Frauds, we affirm.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IRVING P. KARLIN, : 71-C-195

Plaintiff, :

-against- : October 14, 1971

WARREN E. AVIS and :
AVIS INDUSTRIAL CORP.,

Defendants :

----------X

Appearances:

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Of Counsel

ROYALL, KOEGEL & WELLS, ESQS.
Attorneys for Defendants
WILLIAM S. GREENAWALT, ESQ.
Of Counsel

BARTELS, D.J.

Plaintiff Karlin brings this action for a finder's fee, in which he claims that defendant, Warren E. Avis (Avis), president of defendant Avis Industrial Corp. (Industrial), engaged Karlin to find a purchaser for Avis' shares of stock in Industrial and that Industrial, through its president and vice-president, engaged Karlin to find a buyer for shares of its treasury stock. Karlin further claims that through his efforts an agreement of sale (purchase agreement) was signed on January 16, 1969, between Avis and Industrial as sellers and

Ultra Dynamics Corporation (Ultra Dynamics) as buyer, whereby Ultra Dynamics agreed to purchase the above shares of Industrial stock from the defendants.

Karlin moves for summary judgment pursuant to Rule 56(b), F.R. Civ.P., 28 U.S.C., and both Avis and Industrial counter-move for judgment on the pleadings under Rule 12 (c), F.R. Civ. P., 28 U.S.C., or, in the alternative, for summary judgment pursuant to Rule 56(b), F.R. Civ.P., 28 U.S.C. At issue is whether any agreement or contract between the parties for a finder's fee or compensation was reduced to a memorandum or writing subscribed by the defendants, in compliance with the New York Statute of Frauds, General Obligation Law, §5-701 (10).[1/] From the pleadings, exhibits and affidavits of

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1/"§ 5-701. ***Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

****

10. It is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of

(continued)

the parties, the pertinent and undisputed facts are as follows:

Conversations about the possible sale of the stoc of Industrial to a buyer represented by Karlin, were begu between Karlin and one Sidney McNiece, an officer of Indu trial in September of 1968. On October 16,1968, Karlin wrote a letter to Thomas Ault (Ault), president of Indus- trial, who was conducting negotiations for Avis, in which Karlin discussed the proposal of one Richard Weisinger, attorney for the prospective buyer, and in which Karlin wrotc:

1/ (continued)

any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein; including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. 'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman."

> "I wish to advise you that Mr. Weisinger has agreed that if a contract is consummated, as buyers, he will pay one half of the applicable finder's fee; the other half to be paid by the seller. This finder's fee would accrue to me on the basis of the 5-4-3-2-1 formula or in equivalent Avis stock at market value on date of contract."

On October 24, 1968, Weisinger wrote a memorandum to Karlin, in which he stated:

> "I agree that any deal which may be resolved for the above acquisition will include a 5% finder's fee of which 1/2 (one-half) will be paid to Irving Karlin by the buyer and the other 1/2 (one half) by the Seller."

On November 16, 1968, Karlin wrote a letter to McNiece, mentioning the proposed terms of the sale and stating:

> "In my letter to Mr. Ault, I confirmed the foregoing and indicated Mr. Weisinger's agreement to pay one half of the finder's fee, without disturbing the price of $4,000,000. targeted. In our personal meetings and phone conversations you made it clear that you were acting solely in Mr. Avis's personal interest without any claims for finders fees. I presume Mr. Ault was acting similarly in his participation at the meetings."

Karlin also enclosed with this letter a proposed letter of intent, dated October 28, 1968, from Weisinger to Avis, setting forth in four numbered paragraphs the proposed terms of the sale, and also setting forth in a paragraph numbered "(5)" the following:

"The parties agree that the finder's fee payable to Irving P. Karlin will be paid 50% by the Seller and 50% by the buyer."

Space was provided for Avis' signature at the bottom of this proposed letter of intent but Avis never signed it.

On January 16,1969, Avis signed an acceptance of a letter agreement addressed to him by Ultra Dynamics providing for the sale of his stock to Ultra Dynamics, which included the following paragraphs:

"(c) You have not dealt with any broker or finder in connection with the sale of the shares, other than Mr. Irving P. Karlin.

****

15. We acknowledge that no broker or finder has been involved in our negotiations except Mr. Irving P. Karlin. We agree that we shall pay in full the finder's fee payable to Mr. Karlin upon final consummation of this transaction."

On the same date, Ault as president of Industrial signed another agreement on behalf of Industrial to sell treasury stock of Industrial, in which there was no mention of either Karlin or any finder's fee.

On January 16,1969, Karlin signed an agreement with Ultra Dynamics, the buyer, reading as follows:

"In connection with the agreements between you and Warren E. Avis and you and Avis Industrial Corporation I have acted as finder. In full consideration thereof I agree to accept Nine Thousand (9,000) Shares of Common Stock, $.10 par value, of Ultra Dynamics Corporation and do hereby release you from any and all further claims thereunder. Such payment to me shall be paid upon final consummation of the foregoing transaction.

Irving P. Karlin
Irving P. Karlin

Agreed and Accepted
Ultra Dynamics Corporation"

Based upon these writings and Karlin's legal interpretation of oral conversations between the parties, Karlin alleges that a valid contract existed between Avis and Industrial and himself,whereby both were obligated to pay him one-half of the finder's fee, and that this contract was not altered by Avis' purchase agreement with Ultra Dynamics because there was no consideration for Karlin's acceptance from Ultra Dynamics of a lesser sum than that to which he claims he was entitled. Defendants, in reply, point out that there was no agreement at all on their part to pay Karlin a finder's fee and that the writings mentioned, including in particular the January 16,1969 agreement of sale between Avis and Ultra Dynamics, contain no such agreement and at all events these writings are insufficient to meet the requirements of the Statute of Frauds.

That the New York Statute of Frauds is applicable to the facts in this case,cannot be denied. Minichiello v. Royal Business Funds Corp., 18 N.Y.2d 521,277 N.Y.S. 2d 268 (1966), cert.denied, 389 U.S. 820 (1967);Clivner v. Ackerman,51 Misc,2d 856,274 N.Y.S. 2d 112 (1966),affirmed, 30 A.D. 2d 642,291 N.Y.S. 2d 759 (1968). This being so, it is incumbent upon Karlin to produce some writings subscribed by the defendants,in which they agree to pay the finder's fee.[2/] The only writing signed by Avis is the agreement of January 16,1968,for the sale of shares of Industrial stock and in which Ultra Dynamics, and not Avis, agreed to pay in full any finder's fee.

Karlin attempts to evade the demands of the Statute by asserting (1) that his case is governed by Morris Cohon & Co. v. Russell,23 N.Y. 2d 569,297 N.Y.S. 2d 947 (1969) in

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2/ Some argument might be made that the failure of Ault and McNiece to answer Karlin's letters was a consent to the terms stated therein. However, only when there is a duty to answer may silence be treated as a consent. See, Albrecht Chemical Co. v. Anderson Trading Corp.,295 N.Y. 437,64 N.Y. 2d 625 (1946); 1 Corbin, Contracts, 272 (1963). In the context of this case there was no such duty and moreover, such an implied consent by silence would not satisfy the Statute of Frauds.

it the purchase agreement between Avis and Ultra Dynamics in effect a memorandum of agreement between Avis and Karlin fficient to satisfy the Statute,and that the purchase agreent between Industrial and Ultra Dynamics also somehow comes thin this principle inasmuch as the president and vice-esident of Industrial had full knowledge of the terms of mpensation due Karlin as a finder when they signed the reement to sell the treasury stock to Ultra Dynamics,and) that if the purchase agreement alone between Avis and tra Dynamics was not a sufficient memorandum,the letters ove described sent by Karlin to Ault and McNiece, the agreent of October 24,1968 between Karlin and Weisinger, and e unsigned letter-proposal of October 28,1968 from Weisinger Avis,when considered and read together with the purchase reement,constitute a memorandum sufficient to comply with e Statute. Neither of these contentions is valid.

In Cohon the seller in the contract of sale repreted that he dealt with no person other than Cohon as a nder and he agreed to indemnify the buyer against any liaility for a finder;s commission or fee. The court read this reement as an admission that Cohon had performed services that when read together with the indemnification clause,

this admission by implication established that the defendant was obligated to pay Cohon for services rendered. The instant case is quite different because,while both the seller and the buyer acknowledged not having dealt with any finder other than Karlin,the buyer,Ultra Dynamics,and not the seller,Avis,explicitly agreed to "pay in full the finder's fee payable to Mr. Karlin upon final consummation of this transaction." It is difficult, if not impossible, to imply from this statement an acknowledgment on the part of Avis that he had any obligation to pay Karlin a finder's fee. Indeed, the application of the Cohon principle to the present situation would establish,if anything, that Ultra Dynamics, rather than Avis, was obligated to pay Karlin "in full" for services rendered. And Ultra Dynamics in fact did pay Karlin a finder's fee on January 16,1969, at which time Karlin not only signed a release of Ultra Dynamics but also acknowledged that the payment was "in full consideration" for acting as a finder in connection with the two purchase agreements.

In claiming a finder's fee from Industrial, Karlin relies on Bradkin v. Leverton, 26 N.Y. 2d 192, 309 N.Y.S. 2d 192 (1970), which we find totally inapplicable. In that case a corporation had employed the plaintiff under an agreement

forceable under the Statute of Frauds, to find corporations
need of financing. This the plaintiff did by arranging
r the financing of Mauchly Associates, Inc. Defendant, an
fficer, director and stockholder of the corporation, inter-
ned and arranged for private financing with Mauchly, and
en sued interposed the Statute of Frauds as a defense to the
laintiff's claim for a finder's fee. In that case there was
valid written contract by the corporation to pay a finder's
e, which the officer "took over" when he substituted himself
r his corporation by arranging for the private financing of
uchly. Here there was no such contract by Industrial to pay
finder;s fee and there was no "take over" by any officer of
dustrial.

We come now to Karlin's second contention of com-
ning and reading together all the writings, which claim is
ss convincing than his first. Karlin cites in support of
s argument, Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y.
, 110 N.E. 2d 551 (1953). That case involved an action for
each of an employment contract and the court did, in finding
enforceable agreement under the Statute of Frauds, combine
gether three writings, two of which had been signed by the
fendant and one of which was unsigned. The two signed papers

consisted of two payroll cards signed by officers of the defendant-corporation, indicating the salary agreed upon, and the unsigned document was prepared by the defendant's agent and contained a further term of the employment. The court held that a Statute of Frauds memorandum need not be in one document but is satisfied when signed documents pieced togeth with an unsigned paper all refer on their face to the same transaction and corroborate evidence of defendant's assent t the contents thereof. We find in this case no document signe by the defendants,indicating liability to Karlin for commissions,and the unsigned documents,which Karlin attempts to combine with the purchase agreements, were prepared and sign not by the defendants,but by Karlin. Letters which defendant did not sign cannot be combined with other unsigned document to affix liability under the Statute of Frauds. Solin Lee C v. Ling Sun Chu,9 A.D. 888,193 N.Y.S. 2d 859 (1959); accord, Brause v. Goldman, 10 A.D. 2d 328, 199 N.Y.S. 2d 606 (1960), affirmed, 9 N.Y. 2d 620, 210 N.Y.S. 2d 225 (1961). As stated in Bradkin, the Statute of Frauds is to protect agains fraudulent dealings between the finder and his employer,"not between the finder and a third party, such as the defendant before us."

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For the above reasons, the defendants' motion is hereby granted, the plaintiff's motion is hereby denied and the complaint is hereby dismissed. This is an order.

John R. Bartels
United States District Judge

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

IRVING P. KARLIN,

Plaintiff,

-against-

WARREN E. AVIS and
AVIS INDUSTRIAL CORPORATION,

Defendants.

71-C-195

May 20, 1971

----------x

Appearances:

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WILLIAM S. GREENAWALT, ESQ.
JOSEPH SESSA, ESQ.
Of Counsel

BARTELS, D.J.

Defendants, Warren Avis and Avis Industrial Corporation (hereafter "Avis Industrial"), move to dismiss this removed diversity contract action upon the grounds that there is no in personam jurisdiction over either of them and, with respect to Warren Avis, that service of process was improper.

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under New York law.

In his affidavit in opposition to defendants' motions the plaintiff, Irving Karlin, alleges the following facts.

In about September, 1968, Karlin spoke to Sidney McNiece, Treasurer, Secretary and Financial Vice President of Avis Industrial, with respect to a possible sale of Avis Industrial. McNiece suggested that the best way to effectuate the sale of the corporation would be a sale of the controlling stock interest, which was held by Warren Avis. Karlin claims that all conversations and meetings referred to in his affidavit occurred in New York. After speaking with some prospective buyers, Karlin met with McNiece and Thomas J. Ault, the president of Avis Industrial, on or about October 15, 1968, at 715 Park Avenue (an apartment leased by Avis Industrial). At this meeting Karlin was told by McNiece and Ault that the company needed cash, that Warren Avis would not put it up but that Warren Avis "offered through Mr. Ault and Mr. McNiece (as officers of Avis Industrial Corp. and as authorized agents for Mr. Avis) to sell the corporation by a purchase of a controlling interest of Avis stock." Specifically, Karlin was told at the meeting that Warren Avis had authorized McNiece to explore with Karlin, as finder, a

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prospect for the purchase of the Warren Avis stock. Karlin told McNiece that he was looking for a commission of 5% of the consideration involved in the deal, half of it to be paid by each side. McNiece and Ault asked Karlin to consider reducing their side's fee to a lower recognized formula, which Karlin agreed to accept and for which McNiece assured Karlin that he had the approval of Warren Avis. A meeting was then arranged, attended by McNiece, Ault, Karlin, and one Richard Weisinger, a prospect found by Karlin who represented a buying group. At that meeting it became clear that Avis Industrial would, in fact, need more cash. Consequently, a possible $2,000,000 equity financing was discussed. In addition to other meetings, a final meeting was held in New York City on January 9, 1969, attended by McNiece, Ault, Weisinger, and Warren Avis. At that meeting, not attended by Karlin, it was agreed that Warren Avis would sell all his Avis Industrial stock to Ultra Dynamics for $4,000,000 and that Avis Industrial would sell 49,744 shares of its treasury stock to Ultra Dynamics for $596,928. At the meeting Buyer and Seller agreed to set aside for Karlin a finder's fee of $132,000. The agreement was reduced to a formal writing in Detroit, Michigan, on or about January 16, 1969. The formal agreement

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recognized that Karlin was the finder entitled to be paid. Karlin was not paid.

Based upon this version of the facts, Karlin claims that he is entitled to a commission from Warren Avis on the sale of his personal stock and a commission from Avis Industrial on the sale of its treasury stock. His position is that the officers of Avis Industrial in negotiations with him acted for both Warren Avis and Avis Industrial. He claims that the ultimate goal was the sale of the corporation and that the only way to sell the corporation was to sell the controlling shares of its stock, which happened to be owned by Warren Avis. In addition, Karlin claims to have worked out a proposal for assisting the corporation to obtain working capital of $2,000,000, which proposal was not acted upon but which was partially substituted for by the sale of the treasury stock. Service of process upon Warren Avis was attempted on January 23, 1971, by leaving the summons at the 715 Park Avenue apartment with Warren Avis, Jr., the twenty-year old college student son of Warren Avis.

Defendants claim that in personam jurisdiction was not secured over Avis Industrial or Warren Avis, and that service of process upon Warren Avis was defective. No claim

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is made that there was any irregularity in the service of the summons and complaint upon Avis Industrial on January 18, 1968. In adjudicating the issues of jurisdiction over the defendants raised by these facts, the court will attempt to discern the conclusion which it believes a New York court would reach were it presented with the same facts.

Warren Avis
Long-Arm Jurisdiction

The initial question for consideration is whether there is personal jurisdiction over Warren Avis. The relevant statute is the N.Y. CPLR §302(a)(1), which provides that a court may exercise jurisdiction over a non-domiciliary 'for causes of action arising out of the transaction of business within the state by the non-domiciliary or his agent.'[1] Since no affidavit submitted by the defendants disputes the crucial facts that a brokerage agreement was concluded in New York between Karlin and McNiece and Ault, acting as agents for Warren Avis, the case falls squarely within §302(a)(1). The argument of Warren Avis that the final contract between Avis and Ultra Dynamics for the sale of Avis stock was consummated in Michigan, not New York, is entirel

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irrelevant since it is the finder contract, not the Ultra Dynamics contract, which gives rise to the instant cause of action. The negotiations for and conclusion of a contract within New York is unquestionably a transaction of business supporting long-arm jurisdiction. Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 308 N.Y.S.2d 337 (1970). The instant case is clearly distinguishable from the situation present in Glassman v. Hyder, 23 N.Y.2d 354, 296 N.Y.S.2d 783 (1968) [the most factually analogous case discovered by the court], where a New York broker entered into a verbal telephone brokerage contract with a New Mexican landowner who never entered New York and who never sent an agent into New York. In addition, and for the record, it should be noted that defendants' position that jurisdiction will not attach where the contract is not consummated in the forum state is not supported by the authorities. Generally, it is held that substantial negotiations for a contract are a sufficient predicate for the assertion of New York long-arm jurisdiction even though the contract is culminated elsewhere. See e.g. Liquid Carriers Corporation v. American Marine Corporation, 375 F.2d 951,956 (2d Cir.1967); Potter's Photographic Applications Co., Inc. v. Ealing Corporation, 292 F.Supp. 92,100-103

(E.D.N.Y.1968); Northland Paper Company, Inc. v. Mohawk Tablet Company, 271 F.Supp. 763 (S.D.N.Y.1967); cf. National Gas Appliance Corporation v. AB Electrolux, 270 F.2d 472 (7th Cir.1959), cert. denied, 361 U.S. 959 (1960).

Service of Process

The remaining issue involving Warren Avis is whether service was properly made upon him. As stated above, the process server went to the apartment at 715 Park Avenue and left the summons with Warren Avis, Jr., a student at Brown University, who was staying at the apartment on one of his occasional social visits to New York City. A copy of the summons was then mailed to Warren Avis, Sr. at the aforesaid address. 2/

Section 308 of the CPLR was amended, effective September, 1970, to provide, in pertinent part, that service may be made upon a natural person by

> "2. * * * delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by mailing the summons to the person to be served at his last known address * * * ."

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The court must decide whether the requirements of this statute have been met. To resolve the initial question of whether the Park Avenue apartment is the dwelling place or usual place of abode of Warren Avis, it is necessary to review the history of the apartment. According to the affidavit of McNiece, the apartment was leased prior to January, 1970 by Avis Industrial as a place to stay, instead of a hotel room, for its officers and top employees while in New York. In addition, it was used from time to time for the conduct of business relating to Columbia Metal Products Co., Inc., a wholly-owned subsidiary of Avis Industrial. Karlin claims that beginning in January, 1970, Warren Avis took the apartment in his own name and paid the rent therefor. Karlin further claims that he made daily telephone calls to the apartment during the week prior to service of process and invariably received the answer that the caller should leave his name, phone number and a message and that Warren Avis would return the call. Avis does not deny the foregoing and, in fact, admits that he has "maintained" the apartment since January, 1970. He counters, however, with the argument that he is a resident and domiciliary of Michigan, with his residence at 8120 East Jefferson Avenue,

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Detroit, Michigan, and that he uses the apartment sporadica in lieu of a hotel room, when he is in New York City, usual on the way to some other destination.

The task of determining whether this apartment was Warren Avis' dwelling place or usual place of abode is complicated by the paucity of case law interpreting these ter See I Weinstein-Korn-Miller, New York Civil Practice par. 308.13. To fill this case law vacuum it is necessary to focus on the purpose of CPLR §308(2). Professor McLaughli in his 1966 commentary to the CPLR, points out that the concept of in personam jurisdiction "entails two distinct ideas: (1) a basis for jurisdiction; and (2) fair notice t the defendant." He states that where there is a valid predicate for jurisdiction, §308(3) (formerly §308(2)) addresses itself only to the element of fair notice, seeki to assure that process is served on the defendant "in a fashion calculated to apprise him that he is being sued, a to afford him an opportunity to litigate." See Entwistle Stone, 53 Misc.2d 227, 278 N.Y.S.2d 19 (Supreme Court, Onondago County, 1967). Here the court has found jurisdic based upon the transaction of business in New York under CPLR §302(a)(1); thus it is now concerned only with the

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notice-giving element of the statute. Centering attention, therefore, on this purpose, it seems clear that delivery of process to a person of a suitable age and discretion at an apartment such as the one here designated, is well calculated to give the defendant notice of the proceedings instituted against him.

Turning to a more literal approach, there seems no basis for concluding that the apartment was not the "dwelling place" of Warren Avis. In a highly mobile society it is unrealistic to interpret CPLR §308(2) as mandating service at only one location where, in fact, a defendant maintains several dwelling places. Cf. Wright & Miller, Federal Practice and Procedure §1096. Indeed, Warren Avis appeared to divide his time between Michigan, New York, Mexico and Europe. This common-sense approach at definition finds support in the case law. In Pickford v. Kravetz, 17 Fed. Rules Serv. 4d 121 case 1 (S.D.N.Y.1952), the district court held that a hotel where a defendant stayed with his wife for approximately one week was a dwelling place within the meaning of rule 4d. See Rovinsky v. Rowe, 131 F.2d 687 (6th Cir. 1942); Skidmore v. Green, 33 F.Supp. 529 (S.D.N.Y.1940).

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Warren Avis' connection with the Park Avenue apartment is considerably greater than a transient's nexus to a hotel. The apartment is maintained in the name of Warren Avis, who has paid the rent for it since January, 1970. "'Dwell' is to be distinguished from 'reside' which means 'dwell permanently or continuously' (Webster's Dictionary)." Rich Products Corporation v. Diamond, 51 Misc.2d 675, 678-9, 273 N.Y.S.2d 687,691 (Supreme Court, Erie County, 1966). That Warren Avis is not a resident of New York and that he spends a considerable amount of time elsewhere does not mean that the apartment is not his dwelling place.

The two remaining questions, which involve the propriety of service, require less extended discussion. First, the court is of the opinion that 715 Park Avenue is as much Warren Avis' last known address as is the house in Michigan. Defendants argue that "last known address" is synonymous with "residence", citing Professor McLaughlin's 1970 Commentary to the CPLR. In the Commentary, McLaughlin points out that the former provision, respecting substituted service, required the mailing of the summons to the last known "residence", whereas under the present law it is to be made to the last known address. After stating the change,

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McLaughlin observes that "This change is not explained, and, in the context, the terms appear synonymous." This less than confident conclusion of synonymity is not shared by the court. On the contrary, the statutory change in wording appears to be a liberalization of the prior provision, or, more accurately, a change calculated to more realistically serve the notification purpose of the statute. What is a "last known address" depends upon the particular circumstances of each case and the extent to which it may be reasonably regarded as a place where a defendant is likely to receive a notice addressed to him. If an individual has an address that has been used by him and is known as such, the mailing of the summons to that address will serve the notice function of the statute. Thus the change in statutory language clearly suggests that jurisdiction should not be denied upon the ground that the last known address was not the true residence of the defendant.

Second, it appears obvious that 20-year old Brown University student, Warren Avis, Jr., is a person of suitable age and discretion within the meaning of the statute. Bradian v. Chavez, N.Y.L.J. April 23, 1968, p. 16, col. 6. Warren Avis does not argue to the contrary.

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Avis Industrial Corporation
CPLR §302(a)(1) Jurisdiction

The issue of jurisdiction over the corporate Avis is not easily resolved. Karlin's position with respect to §302(a)(1) jurisdiction is that McNiece and Ault acted as agents not only for Warren Avis but also for Avis Industrial. As previously indicated, he claims that the ultimate goal sought to be achieved by both was the sale of Avis Industrial and that this could only be accomplished by the sale of Warren Avis' stock. In effect, he argues that the contract formula governing his commissions extended to any Avis Industrial stock sold to Ultra Dynamics through his efforts, including the treasury stock. Avis Industrial replies that Karlin had nothing to do with proposing the sale of the Avis Industrial treasury stock, which was first seriously considered in Detroit on January 15th and 16th, and adds that there is no specific allegation in the complaint that Avis Industrial agreed to pay any finder's fee.

This summary of the opposing contentions demonstrates that the same facts which will determine whether Karlin has a cause of action against Avis Industrial will also be decisive in determining whether Avis Industrial has transacted busi-

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in New York. In particular, both issues will involve a careful analysis of exactly what hats McNiece and Ault were wearing in their negotiations with Karlin. Liberally construed, Karlin's complaint and affidavit do charge Avis Industrial with transacting business in New York through the agency of its officers, McNiece and Ault. This precludes the present granting of summary judgment in favor of Avis Industrial on the jurisdictional point. While the court might order a hearing upon this issue in advance, such a course would be tantamount to ordering a trial of the substantive issues of the case. The sounder course is to presently deny the motion for judgment with leave to renew when the facts are adduced at the joint trial. The trial will also serve to clarify the issue of the substantiality of the New York negotiations which now divides the parties.

CPLR §301 Jurisdiction

Finally, Karlin makes the additional argument that Avis Industrial was doing business in New York at the relevant times because Columbia Metal Products Co., Inc., Avis Industrial's New York subsidiary, was a mere corporate shell, with no mind, will or existence of its own. In short,

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he claims that Columbia Metal Products' corporate veil ought to be pierced. Avis Industrial argues that its subsidiary was an independent entity and, in any event, ceased doing business in September, 1968. Karlin denies the latter fact contending that it continued doing business several months into 1969.

The court notes that piercing of the corporate veil, if only for jurisdictional purposes, is a drastic approach authorized only in the most extreme circumstances. In the New York courts it is generally eschewed except where a wholly-owned subsidiary is performing services for the parent in New York, which are essential for the parent's other business activities. See Frummer v. Hilton Hotels International, 19 N.Y.2d 533, 281 N.Y.S.2d 41 (1967). The factors mentioned by Karlin as justifying piercing the veil do not seem to demonstrate a degree of control much greater than a parent usually maintains over a wholly-owned subsidiary. In all events, since the court is not dismissing the case against Avis Industrial in view of the possible §302(a)(1) jurisdiction, there is no necessity to conclusively rule upon this theory at this time.

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Failure to Complete Service

Although not specifically raised as a ground for dismissal, defendants note that Karlin has failed to file papers in the New York courts. Failure to file proof of service is not, however, a jurisdictional defect. See Gordon v. Ellender, N.Y.L.J. October 20, 1969, p. 2, col. 2. Molyneaux v. Sevilla, 22 Misc.2d 450, 194 N.Y.S.2d 417 (1959).

Accordingly, the motions to dismiss, which have been treated as motions for summary judgment, are hereby denied.

SO ORDERED.

United States District Judge

FOOTNOTES

1/ Section 302(a)(1) provides, in pertinent part:

"(a) * * * As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:
1. transacts any business within the state * * *."

2/ Joseph Heller, attorney for plaintiff, submitted an affidavit that service in this manner was attempted after an unsuccessful attempt to serve Warren Avis personally at 8120 East Jefferson Avenue, Detroit, Michigan. To the affidavit was attached a letter from the sheriff of Wayne County, Michigan, to the effect that a deputy had received information that Avis was in New York.

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APPENDIX D

71-2084

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------X

IRVING P. KARLIN,

Plaintiff-Appellant,

v.

WARREN E. AVIS and AVIS INDUSTRIAL CORP.

Defendants-Appellees

----------X

A petition for a rehearing having been filed herein by counsel for the appellant,
Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

April 19,1972

/s/ Paul R. Hays

/s/ James L. Oakes
U.S.C.J.J.

/s/ T. Emmet Clarie
U.S.D.J.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Supreme Court, U. S.
FILED
JUL 7 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1606

IRVING P. KARLIN,

Petitioner,

against

WARREN E. AVIS and AVIS INDUSTRIAL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION

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July 7, 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1606

IRVING P. KARLIN,

Petitioner,

against

WARREN E. AVIS and AVIS INDUSTRIAL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION

Opinions Below

The opinion of the United States District Court for the Eastern District of New York (App. B of Petition) is reported at 332 F. Supp. 957. The opinion of the United States Court of Appeals for the Second Circuit (App. A of the Petition) is reported at 457 F. 2d 57. An earlier opinion of the District Court denying respondents' motion to dismiss the action on jurisdictional grounds (App. C of Petition) is reported at 326 F.Supp. 1325.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Is the decision of the United States Court of Appeals for the Second Circuit, unanimously affirming an order of the United States District Court for the Eastern District of New York which denied petitioner's motion for summary judgment and granted respondents' motion for summary judgment on the grounds that petitioner's claim is barred by the New York Statute of Frauds, in conflict with the decisions of the New York Court of Appeals in *Morris Cohon & Co.* v. *Russell*, 23 N.Y.2d 569, 245 N.E.2d 712, 297 N.Y.S.2d 947 (1969), and *Bradkin* v. *Leverton*, 26 N.Y.2d 192, 257 N.E.2d 643, 309 N.Y.S.2d 192 (1970)?

The petitioner also raises the question whether the decision below is in conflict with applicable decisions of this Court and with the Due Process Clause of the fourteenth [*sic;* fifth] amendment to the United States Constitution, but does not elaborate upon this question.

Statute Involved

The New York General Obligations Law, § 5-701(10) provides:

> "Every agreement, promise or undertaking is void unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> * * *

"10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. 'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman."

Statement of the Case

In order to place the petition in context, the relevant undisputed facts, which are set forth succinctly in the opinion of the Court of Appeals (457 F.2d 57) and that of the District Court (332 F.Supp. 1325), may be stated as follows:

In or about September 1968, conversations developed between petitioner and one Sidney McNiece, who was then the Treasurer and Financial Vice President of Avis Industrial Corporation ("Industrial"), with respect to the possible sale of a controlling interest in Industrial, which was held by Warren E. Avis ("Avis"). Despite disagreement between the parties over whether the suggestion of Ultra Dynamics Corporation ("Ultra") buying Industrial stock came first from Ultra or Avis, it is undisputed that at the time of these initial conversations Ultra, the buyer, was "represented by Karlin." 332 F.Supp. at 959. A meeting was held on October 15, 1968 between McNiece and Thomas Ault, the President of Industrial, on the one hand, repre-

senting Avis, and Richard H. Weisinger, Chairman of the Board of Ultra, on the other; petitioner was also present. Prior to that meeting, Karlin had obtained from Weisinger his written agreement that upon Ultra's acquiring control of Industrial petitioner was to receive a 5% commission, "of which ½ (one-half) will be paid . . . by the buyer and ½ (one-half) by the seller." Avis "was not a party to this arrangement" (457 F.2d at 59), and neither petitioner nor Weisinger asked or obtained Avis' agreement to such a document or such terms. At the meeting, McNiece told petitioner that Avis "would under no circumstances pay any part of a finder's fee." *Ibid.* In a letter dated October 16, 1968 to Ault, petitioner noted his agreement with Weisinger:

> "I wish to advise you that Mr. Weisinger has agreed that if a contract is consummated, as buyers, he will pay one half of the applicable finder's fee; the other half to be paid by the seller. This finders fee would accrue to me on the basis of the 5-4-3-2-1 formula or in equivalent Avis stock at market value on date of contract. (negotiable)"*

Ault did not respond (*ibid.*) and on November 16, 1968, plaintiff sent another letter, this time addressed to McNiece, and enclosed a proposal letter from Weisinger to Avis dated October 28, 1968 which contained the following clause:

> "(5) The parties agree that the finder's fee payable to Irving P. Karlin will be paid 50% by the seller and 50% by the buyer."

The letter contained a blank for Avis' signature of agreement, but Avis declined to sign (*ibid.*; 332 F.Supp. at 959), and McNiece told Weisinger by telephone that Avis had rejected the idea. 457 F.2d at 59.

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* Thus in the original.

Ultra nevertheless continued to be interested in acquiring Avis' stock and continued to be in contact with McNiece. A meeting between the representatives of Ultra and the representatives of Avis and Industrial took place on January 9, 1969 at which, for the first time, the possibility of Ultra's purchasing certain Industrial treasury stock was raised. Petitioner was told of the discussion at the meeting, including Avis' continued refusal to pay any finder's fee. *Ibid.*

A further meeting was arranged for January 16, at the offices of Avis' attorneys in Detroit, which was attended by representatives of Avis and Industrial and by Weisinger and Robert L. Reich, Executive Vice President and Treasurer of Ultra; petitioner, who flew to and from the meeting with Weisinger and Reich, was present in the attorney's offices. *Ibid.* At the Detroit meeting, Avis and Ultra arrived at a tentative agreement, of which petitioner was advised (*ibid.*), but inasmuch as Ultra had been unable to persuade Avis to assume an obligation for any part of the finder's fee payable to petitioner, execution of the final agreement awaited settlement of the amount of the finder's fee. There then ensued a session of hard bargaining between petitioner and Reich, with Weisinger present, at which Karlin ultimately agreed to accept 9,000 shares of Ultra common stock, which then had a market value of over $109,000.* Karlin then signed the following handwritten agreement:

"January 16, 1969

Ultra Dynamics Corporation
Two Wait Street
Paterson, New Jersey

Gentlemen:

In connection with the agreements between you and Warren E. Avis and you and Avis Industrial Corporation I have acted as finder. In full consideration thereof I

* From the affidavits and oral argument the Court of Appeals concluded that petitioner also entertained "hopes that the price of Ultra Stock would advance." 457 F.2d at 61.

agree to accept Nine Thousand (9,000) Shares of Common Stock, $.10 par value, of Ultra Dynamics Corporation and do hereby release you from any and all further claims thereunder, such payment to me shall be paid upon final consummation of the foregoing transaction.

/s/ Irving P. Karlin
Irving P. Karlin

Agreed and Accepted.

/s/ Ultra Dynamics Corporation"

Ultra then signed the agreements previously negotiated with Avis and Industrial. The Avis agreement contained the following language:

> "2(c). You [Avis] have not dealt with any broker or finder in connection with the sale of the shares, other than Mr. Irving P. Karlin.
>
> * * *
>
> "15. We [Ultra] acknowledge that no broker or finder has been involved in our negotiations except Mr. Irving P. Karlin. We agree that we shall pay in full the finder's fee payable to Mr. Karlin upon final consummation of this transaction."

The Industrial agreement made no reference to Karlin or to any finder's fee.

On November 10, 1969, plaintiff received and accepted the 9,000 shares of Ultra stock (*ibid.*) which, in accordance with section 5 of the Securities Act of 1933, 15 U.S.C. § 77e, and the S.E.C. regulations thereunder, were legended on their face as restricted stock. In November 1970, petitioner attempted unsuccessfully to obtain a no-action letter from the S.E.C. for the sale of the stock, citing in a November 5, 1970 letter to Weisinger "unexpected drastic changes

my personal and financial circumstances".* Following is, and the unfortunate decline in the market price of e stock from the $12⅛ figure at which it stood on Janury 16, 1969, when Karlin agreed to accept the stock, to out $1.00, Karlin wrote Weisinger on July 19, 1971, aiming that the restricted stock was not in accordance ith his January 16, 1969 agreement with Ultra. Shortly ereafter, Karlin instituted this action against Avis and dustrial in the Supreme Court of the State of New York, assau County, alleging that he was entitled to a fee from em as well as from Ultra.

Following removal of the action, on diversity grounds, the United States District Court for the Eastern Disict of New York, and that court's denial of respondents' otion to dismiss for lack of personal jurisdiction over

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* In relevant part, this letter reads as follows:

November 5th, 1970

ULTRA DYNAMICS CORPORATION,
2 Wait Street,
Paterson, New Jersey.

Attention Mr. R. H. Weisinger, Chairman

Gentlemen:

During the latter part of October 1968, I acted as finder in presenting you the opportunity to purchase control of AVIS INDUSTRIAL CORP. This resulted in your acquisition of control stock of AVIS in January 1969.

As my fee, you issued to me 9000 shares of ULTRA DYNAMICS common shares Cert. No. JU-843 bearing "SEC Restrictive Legend".

Now, because of unexpected drastic changes in my personal and financial circumstances, I respectfully request that you act promptly in securing release of the 'restrictive legend' on my stock.

* * *

Very truly yours

/s/ Irving P. Karlin
IRVING P. KARLIN

either respondent and improper service of process upon Avis, 326 F.Supp. 1325 (E.D.N.Y. 1971), petitioner moved for summary judgment or, in the alternative, to strike respondents' affirmative defenses. Respondents cross-moved for judgment on the pleadings or, in the alternative, for summary judgment. The District Court denied petitioner's motion and granted respondents' motion for summary judgment, holding that petitioner's claim is barred by the New York Statute of Frauds. 332 F.Supp. 957 (E.D.N.Y. 1971). The Court of Appeals unanimously affirmed. 457 F.2d 57 (2d Cir. 1972).

Argument

Contrary to petitioner's assertion, this case is an excellent example of the use of summary judgment "to pierce sham claims and resolve actions where the facts are undisputed . . . ." *American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 278 (2d Cir. 1967). Petitioner admits (pp. 19-20) that "Both plaintiff and defendant[s] moved for summary judgment principally to determine whether the Statute of Frauds applied to the facts so as to obviate a long trial", and that the District Court's decision was a "determination of this issue" (p. 20). Petitioner argues that the Court of Appeals "went beyond the question of whether there is non[-]compliance with the Statute of Frauds", but then admits that the Court of Appeals squarely reached and decided that issue. *Ibid.* There has not been, nor is there now, any dispute between the parties over what writings are involved in this case, or that the respondents signed only one writing each, the January 16, 1969 agreements. On this basis, the federal courts properly awarded summary judgment to respondents.

Petitioner's sole contention here as to why a writ of certiorari should issue is that the January 16, 1969 Ultra-Avis

and Ultra-Industrial agreements satisfy the New York Statute of Frauds, New York Gen. Oblig. Law, § 5-701(10), and that the rejection of that view four times by two federal courts—on initial hearing and on petitioner's applications for rehearing in each court—brings those courts into conflict with the decisions of the New York Court of Appeals in *Morris Cohon & Co.* v. *Russell*, 23 N.Y.2d 569, 245 N.E.2d 712, 297 N.Y.S.2d 947 (1969), and *Bradkin* v. *Leverton*, 26 N.Y.2d 192, 257 N.E.2d 643, 309 N.Y.S.2d 192 (1970), in spite of the fact that the New York Court of Appeals has not dealt with the facts presented by this case.

This argument is nothing more than a thinly disguised reiteration of petitioner's arguments below concerning the interpretation of state law which were rejected by both courts after full consideration of extensive affidavits and documentary submissions, and full briefs and oral argument, and the application of the governing state law in accordance with *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).*

POINT I

The decision below is consistent with the decision of the New York Court of Appeals in *Morris Cohon & Co.* v. *Russell.*

It is indisputable that the courts of New York have never ruled upon the factual question presented by this case. Petitioner admits as much at page 16 of his petition where he attempts to gloss over the critical factual dis-

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* Petitioner advanced a variety of other arguments below in support of his claim, some to the District Court and the Court of Appeals, some only to the Court of Appeals. Each was briefed and argued thoroughly by both sides and was considered and rejected by those courts. *See* 332 F.Supp. 957 and 457 F.2d 57. Petitioner has abandoned those arguments.

tinctions between *Morris Cohon & Co.* v. *Russell*, 23 N.Y. 2d 569, 245 N.E.2d 712, 297 N.Y.S.2d 947 (1969), and the instant case. Contrary to petitioner's contention that "These [factual] differences have no relevancy in determining whether the Statute of Frauds applies" (p. 16), those factual distinctions, as the Court of Appeals held, make *Cohon* wholly inapposite, and its effect adverse to petitioner's claim.

In *Cohon*, the defendant-seller signed an agreement with the buyer which contained the following terms (23 N.Y.2d at 573, 245 N.E.2d at 714, 297 N.Y.S.2d at 950-51):

> "The sellers represent and warrant that they have dealt with no person or persons other than Morris Cohon & Co. as broker or finder in connection with the transactions in this agreement, and that all negotiations relative to this agreement have been carried on by them without the intervention of any other broker or finder, and the Sellers agree to indemnify Buyer and the Company and hold them harmless against and in respect of any claim for brokerage or finder's commission relative to this agreement whether by said Morris Cohon & Co. or otherwise."

Weighing the question whether the contract there* satisfied the Statute of Frauds, the *Cohon* court found critical defendant's promise to pay the finder's fee (23 N.Y.2d at 575, 243 N.E.2d at 715, 297 N.Y.S.2d at 952-53):

> "[T]he clause ends with the statement that the sellers agree to indemnify the buyer 'against and in respect of any claim for brokerage or finder's commission * * * whether by said Morris Cohon & Co. or otherwise'. The Appellate Division was of the opinion that this

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* In *Cohon*, as here, the claimant to a finder's fee was not a party or signatory to the contract between the buyer and the sellers.

last statement merely negates the existence of an obligation to any broker or finder other than plaintiff. In our opinion, however, especially when the clause is read as a whole, and by reasonable construction and necessary implication, the language used establishes that defendant indeed was obligated to pay plaintiff for his services. Manifestly, the memorandum herein is sufficient to meet the requirements of the Statute of Frauds."

Thus the agreement in *Cohon* between buyer and seller made it perfectly clear that if any fee was owing, the defendant-seller would pay it.

Here, in stark contrast, *Ultra* was obligated to pay (and did pay) a commission to petitioner. No plainer language could be found than Ultra's promise in its January 16, 1969 purchase agreement:

"We agree that we shall pay in full the finder's fee payable to Mr. Karlin upon final consummation of this transaction."

Unquestionably, the contract, when "read as a whole, and by reasonable construction and necessary implication," establishes that respondents were *not* obligated to pay petitioner for any services. This obviously *contradicts* the construction petitioner urges, is inconsistent with an agreement by defendants to pay, and fails to satisfy the Statute of Frauds.

The Court of Appeals found that the Ultra-Avis agreement "mentioned the finder's fee in a way adverse to appellant's [petitioner's] claim . . . ." 457 F.2d at 59. After a careful examination of the *Cohon* case, that court concluded (457 F.2d at 61):

"The January 16, 1969, Avis-Ultra agreement, quoted in note 3 *supra*, obligates Ultra, not Avis, to pay the

> full finder's fee, and thus can in no way support appellant's claim against Avis. Morris Cohon & Co. v. Russell, 23 N.Y.2d 569, 297 N.Y.S. 2d 947, 245 N.E.2d 712 (1969), does not aid appellant. The agreement there stated that the defendant seller would indemnify the buyer for any finder's fee; here, the *buyer* explicitly agreed to pay, and neither seller can be held." (Emphasis in original)

The District Court, awarding summary judgment to respondents, had concluded (332 F.Supp. at 961):

> "Indeed, the application of the *Cohon* principle to the present situation would establish, if anything, that Ultra Dynamics, rather than Avis, was obligated to pay Karlin 'in full' for services rendered."

Petitioner also cites two Special Term decisions of the New York Supreme Court in support of his argument, *Laidlaw & Co., Inc.* v. *Maple Industries Inc.*, N.Y.L.J., November 30, 1971, at 18, col. 3 (Sup.Ct., N.Y.Co.), and *Klein* v. *Smigel*, N.Y.L.J., April 2, 1972, at 17, col. 3 (Sup.Ct. N.Y.Co.), neither of which is officially reported. Even aside from the rule that federal courts are not necessarily bound, under the *Erie* doctrine, to follow the decisions of state trial courts on questions of state law, *King* v. *Order of Travelers*, 333 U.S. 153 (1948), these cases do not support petitioner's position. *Laidlaw* is factually farther from the instant case than is *Cohon*. There the defendant-seller not only agreed to indemnify the purchaser against any claims for commission by the plaintiff, but also wrote a letter engaging the plaintiff as finder and agreed by letter to pay the plaintiff a "reasonable fee" for its services:

> "If a sale is concluded, we will be happy to negotiate with you the amount and the time of payment of a reasonable fee, it being understood that as of this point in

time, there has been no agreement between us as to the percentage amount that your fee should be."

In the instant case, needless to say, neither of the respondents ever agreed to indemnify anyone against claims of petitioner, and petitioner can point to no document, or combination of documents, subscribed by respondents, which establishes—in the words of *Cohon*—"that defendant indeed was obligated to pay plaintiff for his services." 23 N.Y.2d at 575, 243 N.E.2d at 715, 297 N.Y.S. 2d at 952-53.

In the *Klein* case, also, the writing in question acknowledged that the defendant was obligated to the plaintiff. There the defendant wrote a letter to the plaintiff asking him to sign an enclosed release of the plaintiff's claim to a finder's fee. The trial court, in denying the defendant's motion to dismiss, held that the defendant's signed letter and the enclosed form of release, taken together, satisfied the Statute of Frauds. The situation in *Klein* is totally unlike that in the instant case, since the letter asking the plaintiff there to release his claim admitted, in effect, that the defendant would otherwise be obligated to him. A writing which acknowledges the existence of an oral obligation is sufficient to satisfy the Statute of Frauds, *Argus Co.* v. *Mayor, etc., of Albany*, 55 N.Y. 495, 14 Am. R. 296 (1874), but, as the Court of Appeals held in the instant case, nothing in the January 16, 1969 Ultra-Avis and Ultra-Industrial agreements acknowledges such an obligation. 457 F.2d at 61.

Because of the relevant factual differences between *Cohon* and the instant case, petitioner's argument below and here was and is necessarily that the New York courts, if faced by the factual situation presented by this case, would extend the *Cohon* rule to cover it. The District Court and the Court of Appeals disagreed completely. Taking into account the clear language of the New York Statute of Frauds, and of the January 16, 1969 agreement, they

held that the New York courts would not extend *Cohon* as petitioner contends. *See Cooper* v. *American Airlines, Inc.*, 149 F.2d 355, 359 (2d Cir. 1945).

In the federal judicial system, these courts are regarded as the "experts" on New York law, *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707-08 (1949), and this Court does not ordinarily undertake to second guess them on questions of state law. *Estate of Spiegel* v. *Commissioner, supra*, at 707-08. *See Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). Petitioner has failed to show any inconsistency between the decision of the Court of Appeals in this case and any ruling by the courts of New York, and his petition should be denied.

POINT II

The decision below is consistent with the decision of the New York Court of Appeals in *Bradkin* v. *Leverton*.

Petitioner also sought to recover from Industrial a commission on the sale of Industrial treasury stock to Ultra, despite the fact that the only writing Industrial ever signed was the January 16, 1969 sale agreement between it and Ultra which makes no mention of any finder or of any finder's fee. Petitioner sought and seeks to avoid the bar of the Statute of Frauds by making a specious analogy to the case of *Bradkin* v. *Leverton*, 26 N.Y.2d 192, 257 N.E.2d 643, 309 N.Y.S.2d 192 (1970), the facts in which are so disparate from those of the instant case as to render it, in the words of the District Court, "totally inapplicable." 332 F.Supp. at 961.

In *Bradkin*, H. L. Federman & Co., Inc., employed the plaintiff to locate corporations needing financing. The plaintiff found a suitable corporation, Mauchly Associates, Inc., and Federman entered into a contract with the plain-

tiff which provided for the payment to the plaintiff of "ten percent of [any] net profit" which Federman might realize "[s]hould there be a second financing . . . concerning Mauchly in the year 1967." 26 N.Y.2d at 194-95, 257 N.E.2d at 644, 309 N.Y.S. 2d at 194. Subsequently, the defendant, an officer, director and non-voting shareholder of Federman, lent money to Mauchly for a second financing, and the plaintiff sued for a share of the profits under the terms of plaintiff's agreement with Federman. The New York Court of Appeals held that the complaint stated a cause of action in quasi-contract (26 N.Y.2d at 197-98, 257 N.E.2d at 646, 309 N.Y.S.2d at 196):

> "Since, in short, the defendant took unto himself the Mauchly financing, he obtained the benefit of the plaintiff's labors and must compensate him for such services."

The facts of the instant case differ from *Bradkin* in two respects. First, in *Bradkin* there was a valid agreement, enforceable under the Statute of Frauds, for Federman to pay plaintiff a finder's fee. The court clearly limited its holding to instances where there was such a valid underlying agreement (26 N.Y.2d at 199, 257 N.E.2d at 647, 309 N.Y.S.2d at 198):

> "When, therefore, a finder's contract meets all the requirements of the statute, a third party may not 'take over' that contract and then evade his obligation to the finder by relying on the statute."

There is no agreement in the instant case which satisfies the Statute of Frauds. 457 F.2d at 62; 332 F.Supp. at 361.

Second, the defendant in *Bradkin* "took over" Federman's part of the financing agreement, and lent additional money to Mauchly; the court held that the defendant was

obliged to abide by the terms of the commission agreement between Federman and the plaintiff, even though the defendant was not technically a party to that agreement. Here Industrial did not "take over" anything. *Ibid.*

Following summary judgment against him by the District Court, petitioner, in a patent attempt to make the facts of the instant case more compatible with those of *Bradkin,* argued in the Court of Appeals, and argues here, that he had devised some undisclosed plan to obtain $2,000,000 extra financing for Industrial and that the sale of the treasury stock was somehow designed to take the place of this financing scheme. Assessing this claim, the Court of Appeals stated (457 F.2d at 63):

> "Appellant's [Karlin's] suggestion that he and Mc Niece of Industrial were involved in a financing scheme . . . finds no support in the record."

The record is also barren of any facts, even of any allegations, of any agreement, much less an agreement satisfying the Statute of Frauds, by anyone to pay petitioner a commission on any financing scheme. This aspect of petitioner's claim, and indeed his entire claim, is undermined by his explicit acknowledgment in the January 16, 1969 agreement that his fee of 9,000 shares of Industrial stock was "in full consideration" of his role in connection with the sale of Avis' stock and the treasury stock of Industrial.

POINT III

The District Court's dictum on a motion addressed to personal jurisdiction furnishes no grounds for granting certiorari.

On his motion and respondents' cross-motion for summary judgment in the District Court, and in the Court

of Appeals, petitioner did not make the improper argument that anything in the earlier District Court decision, which sustained "long-arm" personal jurisdiction and service of process over respondents' objections, 326 F.Supp. 1325, had any bearing on summary judgment on the basis of the Statute of Frauds. Now, after the District Court and the Court of Appeals have reviewed extensive affidavits addressed by both sides and by Weisinger and Reich to the facts and have read documents and briefs and heard oral argument on the entire matter, and have reached results adverse to petitioner, petitioner retreats to that earliest opinion, but it cannot be stretched to do the job he asks of it.

Petitioner represents that the jurisdictional opinion contained a "finding" (p. 10) or a "determination" (p. 12) that Avis had orally agreed to employ petitioner as a finder and to pay him a commission. There was no such "finding" or "determination." It should suffice to say that the same Judge, Honorable John R. Bartels, who decided the jurisdictional question, later awarded summary judgment to respondents, holding in the latter opinion that there was no contract or memorandum which satisfied the Statute of Frauds, and strongly suggesting that there was never any contract or agreement of any sort between petitioner and either respondent.

Even a cursory reading of the jurisdictional opinion discloses that petitioner has flagrantly misrepresented it to this Court. Petitioner omits from his lengthy quotation of "facts" (pp. 7-10) the critical introductory statement (326 F.Supp. at 1326):

> "In his affidavit in opposition to defendants' motions the plaintiff, Irving Karlin, *alleges* the following facts." (Emphasis added)

The District Court made no finding of fact whatsoever; it merely assumed, for purposes of the jurisdictional motion, the "version of the facts" set forth by petitioner. 326 F.Supp. at 1327. At that stage of the proceedings, respondents had not completed their investigation of the facts relating to the merits of petitioner's claim, since in their view these allegations were not relevant to the jurisdictional issue, and had submitted affidavits only on the questions of contact with the jurisdiction and service of process. Respondents' affidavits on the facts were submitted upon the motion and cross-motion for summary judgment, at which time petitioner also submitted extensive papers.

In any event, any language in the jurisdictional opinion suggesting that representatives of Avis had agreed orally to pay petitioner a commission is dictum. Where, as in this case, the court's *in personam* jurisdiction over nonresident defendants is based on provisions of the New York "long-arm" statute, New York Civ. Prac. Law and Rules, § 302(a)(1), a decision upholding jurisdiction holds only that the defendants' activities within the state are sufficient to give rise to a claim, and does not operate as a decision on the merits. *See Nelson* v. *Miller*, 11 Ill.2d 378, 394, 143 N.E.2d 673, 681-82 (1957); *LaMarr* v. *Klein*, 35 App.Div.2d 248, 250, 315 N.Y.S.2d 695, 697 (1st Dep't 1970); and McLaughlin, *Practice Commentary*, in 7B McKinney's Consol. Laws of New York, following § 302, at 59, 68-69 (1972).

Further, even if, contrary to fact, there had been a finding to the effect that representatives of Avis entered into an oral contract with petitioner to pay him a commission, it would be irrelevant. The Statute of Frauds requires written evidence signed by the party to be charged of any agreement to pay a finder's fee. *E.g.*, *Minichiello* v. *Royal Business Funds*, 18 N.Y.2d 521, 223 N.E.2d 793, 277 N.Y.S. 2d 268 (1966), *cert. denied*, 389 U.S. 820 (1967). Peti-

tioner's total reliance upon language in a jurisdictional decision, where the same judge later awarded summary judgment to respondents after full presentation and careful consideration of the facts, and where that summary judgment was unanimously affirmed upon a review of the entire record and extensive written and oral argument, is a tacit admission that no substantial grounds for granting a writ of certiorari can be advanced.

Summary

It is undisputed in this case that the only writings signed by respondents, or either of them, are the January 16, 1969 contracts between Ultra and Avis and between Ultra and Industrial. The District Court and the Court of Appeals held that these writings do not satisfy the requirements of the New York Statute of Frauds and that petitioner's claim is therefore barred. The only grounds advanced by petitioner in support of his petition for certiorari is the argument, twice advanced and twice rejected by each of the courts below, that this ruling is in conflict with the law of New York as stated by the New York Court of Appeals in *Morris Cohon & Co.* v. *Russell,* 23 N.Y.2d 569, 245 N.E.2d 712, 297 N.Y.S.2d 947 (1969), and *Bradkin* v. *Leverton,* 26 N.Y.2d 192, 257 N.E.2d 643, 309 N.Y.S.2d 192 (1970). It is clear, however, that there is no holding of the New York courts on the question presented by this case, inasmuch as the cases on which petitioner relies are wholly dissimilar on their facts to the case at bar. There is, therefore, no inconsistency between the decision of the courts below and the law of the State of New York and the petition herein should be denied.

CONCLUSION

For the foregoing reasons the petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Dated: July 7, 1972.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

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Supreme Court, U. S.
FILED
AUG 18 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1606

IRVING P. KARLIN,

Petitioner,

against

WARREN E. AVIS and AVIS INDUSTRIAL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION

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August 16, 1972

IN THE

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Petitioner's reply brief mischaracterizes the record in this case and raises for the first time issues discussed neither in the petition nor in the brief in opposition, so gravely abusing the basis for reply briefs under this Court's Rule 24 (4) that respondents believe clarification is necessary. Rule 24(5).

In his reply brief petitioner raises several contentions which he urged in one or both of the courts below, but abandoned in his petition (*see* respondents' brief in opposition, p. 9, n.). Respondents will not attempt to answer at length these improperly advanced arguments, because these contentions were fully briefed and argued below and were rejected after full consideration by those courts.

Petitioner erroneously contends (reply brief, p. 4) that respondents admitted, in their answer or in the affidavits in support of their summary judgment motion, "that Avis had instructed McNiece to employ petitioner" or pay him a fee. Petitioner well knows that the entire record contains no such "admissions"; as the United States Court of Appeals for the Second Circuit correctly observed (457 F.2d at 62):

> ". . . [T]hese 'admissions' do nothing more than admit certain undisputed facts—*e.g.*, the role of McNiece as Avis's representative and the occurrence of negotiations between appellant and Avis; nowhere do they mention any agreement by Avis; nowhere do they mention any agreement by Avis to pay a finder's fee."

Respondents' affirmative defense, of which petitioner underscores part on p. 4 of his reply brief, and which he cites here for the first time, is simply an alternative defense pleaded pursuant to Rule 8(e), Fed. R. Civ. P., and cannot possibly be construed to admit the existence of an obligation to petitioner.

Petitioner's reply brief also resurrects the argument, firmly rejected by both courts below, that various writings prepared by Karlin or Weisinger and sent to Avis, but not signed by him, may be combined with the January 16, 1969 agreement signed by Avis, to satisfy the Statute of Frauds. This contention the United States District Court for the Eastern District of New York found even "less convincing" than petitioner's main argument. 332 F. Supp. at 961. As the District Court observed (*Id.* at 962):

> "Letters which defendants did not sign cannot be combined with other unsigned documents to affix liability under the Statute of Frauds. Solin Lee Chu v. Ling Sun Chu, 9 A.D.2d 888, 193 N.Y.S.2d 859

(1959); *accord,* Brause v. Goldman, 10 A.D.2d 328, 199 N.Y.S.2d 606 (1960), affirmed, 9 N.Y.2d 620, 210 N.Y.S.2d 225, 172 N.E.2d 78 (1961)."

See also 457 F.2d at 62.

Petitioner also makes once again the argument he urged unsuccessfully in the Court of Appeals that Avis was under a duty to respond in writing to the writings addressed to him and that his failure to do so constitutes acceptance of the terms stated in those writings. The Court of Appeals, after thorough consideration of petitioner's authorities, flatly rejected that contention:

"There are several answers to this claim. Finder's fees generally are allowed only upon a showing of affirmative written evidence of assent to paying the fee by the person to be charged. *See Minichiello, supra,* 18 N.Y.2d at at 526-27, 223 N.E.2d at 796, 277 N.Y.S.2d at 272. No such affirmative action was taken by Avis. On the contrary, appellant was informed several times that his proposal was rejected by Avis, most pointedly by Avis's failure to sign the proposal sent to him by Weisinger on October 28, 1968. These rejections hardly constitute silence within appellant's theory of silence constituting acceptance. Further, assuming arguendo that Avis was under a duty to speak, he did speak, and his verbal responses to written proposals were proper. *Gray* v. *Kaufman Dairy & Ice Cream Co.,* 162 N.Y. 388, 397-98, 56 N.E. 903, 905-06 (1900); *Learned* v. *Tillotson,* 97 N.Y. 1, 12, 49 Am. R. 508 (1884). The cases relied upon by appellant show only that silence may equal acquiescence in special circumstances, *e.g.,* when an oral contract already exists, which was not the case here. In New York silence as acceptance generally arises only when the effect of silence is to mislead the other party, *Tannenbaum Textile Co.* v. *Schlanger,* 287 N.Y. 400, 404, 40 N.E.2d 225, 227 (1942); *More* v. *New York Bowery Fire*

> *Insurance Co.*, 130 N.Y. 537, 545, 29 N.E. 757, 758-59 (1892), an effect neither alleged nor shown here. An offeror has no power to transform an offeree's silence into acceptance when the offeree does not intend to accept the offer, *Albrecht Chemical Co.* v. *Anderson Trading Corp.*, 298 N.Y. 437, 84 N.E.2d 625 (1949); Avis's intent was clearly not to accept appellant's fee proposal." (457 F.2d at 61-62).

Finally, petitioner argues again that the January 16, 1969 agreement between Avis and Ultra, even though clearly providing that only Ultra was to pay petitioner a fee, somehow acknowledges that Avis also was obligated. Petitioner cites for this proposition certain antique cases which hold only that a writing which acknowledges the existence of an oral contract, even though repudiating that contract, satisfies the Statute of Frauds. But as the Court of Appeals held (457 F.2d at 61):

> "Because there is nothing in the January 16 agreement acknowledging Avis's intent to be bound by an oral agreement regarding division of payment of the fee with Ultra (in fact quite the opposite is the case), appellant is not assisted by cases holding that writings signed by the party to be charged which *acknowledge* the making of an oral contract may satisfy the Statute of Frauds."

Klein v. *Smigel*, N.Y.L.J., April 2, 1972, at 17, col. 3 (Sup. Ct. N.Y. Co.), which the Court of Appeals considered and rejected on the petition for a rehearing in that court, is totally inapplicable (*see* brief in opposition, p. 13).

Respondents observe in closing that there is no substance to petitioner's claim that they have abandoned their position in the Court of Appeals that the Statute of Frauds requires "affirmative written evidence of assent to paying the fee by the person to be charged" (reply brief, p. 1). While petitioner's characterization of respondents' "new"

position is not a quotation from p. 11 of the brief in opposition or any other page of that brief, respondents agree that the Statute of Frauds does require that the person to be charged must give affirmative written evidence of his assent to paying the fee and must give written evidence of "an intention to be obligated to pay for services rendered."

Petitioner failed in his petition to this Court to state any persuasive grounds for granting a writ of certiorari, and this last-ditch attempt to recall previously rejected and abandoned arguments adds nothing to that showing.

CONCLUSION

For the foregoing reasons the petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Dated: August 16, 1972.

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